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No. 10-220

Supreme Court, U.S.
FILED
NOV 1 - 2010
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

SEAN STEPHEN AND DARYL STEPHEN,

Petitioners,

-v.-

P.O. JOHN HANLEY, SHIELD NO. 13199, P.O. EDGAR BOURDON, SHIELD NO. 30988, SGT. JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, AND DET. JOSE HERNANDEZ,

Respondents.

==========

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's refusal to give a "duty to intervene" jury instruction as a proper exercise of its discretion, where respondents would have been unfairly prejudiced by the introduction at trial of a new theory of liability of which respondents had not been given notice?

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STATEMENT OF FACTS

Petitioners Sean Stephen and his teenage son Daryl Stephen (collectively "petitioners") commenced this civil rights action under 42 U.S.C. § 1983 against respondents, John Hanley, Edgar Bourdon, Juan White, Michael Illiadis, Terrence

Brill, Patrick Coleman, Derek Dunston, Richard Miller and Jose Hernandez, police officers employed by the New York City Police Department (A104-A111).[1] In their fourth amended complaint (the "Complaint"),[2] petitioners claimed that respondents violated their rights under the Fourth and Fourteenth Amendments of the United States Constitution by using excessive force against them during the execution of a search warrant and subsequent arrest of Sean Stephen.

After having filed five complaints and completed discovery on petitioners' sole claims of excessive force against respondents, petitioners sought, on April 7, 2009, to include a claim for failure to intervene into the case as Requested Jury Instruction Number 22 in their Proposed Jury Instructions (A235-A236; Appendix F). In the amended complaint, petitioners, then pro se, alleged that Miller and Dunston observed petitioners being subjected to force (A86). Petitioners subsequently deleted those allegations in the (fourth amended) Complaint prepared by counsel.

At a pre-trial conference held on May 27, 2009 (A264-A302), the District Court observed that "there is nothing [in the fourth amended complaint] that hints about such a claim" for failure to intervene (A281). Petitioners argued that the claim

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[1] "A ___" citations refer to the Joint Appendix filed in the Second Circuit.

[2] Petitioners commenced this action pro se (A42-A53), but were represented by counsel at the time of the filing of the fourth amended complaint (A104-A111).

could be inferred from allegations that the officers were present at the scene,[3] and that they were on notice of the claim from the pleadings and deposition testimony (A281). Respondents countered that the Complaint failed to put them on notice of such a claim where there were no allegations that any of the respondents witnessed, or were even in a position to witness, the use of excessive force by any other respondent (A384-A385); and that respondents would be prejudiced if this new theory of liability were introduced into the case at such a late juncture (A384-A385).

On June 1, 2009, the District Court denied petitioners' request for a failure to intervene charge because it had not been pled adequately, either in the (fourth amended) Complaint or in any prior pleading (A510; Appendix B). The District Court stated that "the courts require that a failure to intervene claim must be pled with sufficient particularity by naming which defendants are allegedly liable for failure to intervene with respect to each particular incident" (A510-A511; Appendix B).

At the charging conference on June 5, 2009, the District Court declined to permit the inclusion of a failure to intervene claim in the case (A1667; Appendix D). The court observed that respondents

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[3] According to a stipulation, dated May 26, 2009, it was agreed that respondents White, Iliadis, Brill, Coleman, Dunston, Miller, and Hernandez (the "ESU team") were present in the apartment during the execution of a search warrant on July 10, 2002; and respondents Hanley and Bourdon entered the apartment after the ESU team had secured petitioners (A262-A263, Appendix G).

had objected since first being put on notice in April 2009 via the proposed jury instruction that petitioners sought to proceed under that theory (A1660; Appendix D). The trial court also observed that the Second Circuit had not yet decided whether a claim for failure to intervene must be pled as a separate cause of action (A1660; Appendix D). Moreover, in this case, there was "a total absence of any appropriate notice" in the complaint, which had been prepared with benefit of counsel, and the lengthy delay would unfairly prejudice respondents (A1661; Appendix D). Finally, the District Court found it significant that petitioners never sought to amend their pleadings to include this claim (A1661-A1662; Appendix D).

After hearing further argument on the issue (A1662-A1666; Appendix D), the District Court stated as follows (A1667; Appendix D at 28a-29a):

I mean, if anything, the prior complaint that you rely on, the March 17, 2004 complaint, in which the plaintiffs point out that they alleged that Defendant Miller saw excessive force and Defendant Dunston watched excessive force being used against the plaintiffs, that may have been adequate, but it was superseded by the fourth amended complaint, and that was dropped out. So, if anything, it had the effect of putting [defendants] on notice that they weren't going to be facing exposure or failure of their duty to intervene. If anything it would have lulled the defendant into thinking: All right. Well, that's not a theory under which we face exposure. And again, you know, for me to try to -- it's prejudicial, I have no doubt, and I do believe that the opening statement could have been different. Had they known, I believe, the

witnesses that they might have called would have been different. Indeed, their summations, which are going to be given today, are probably going to be different based on that. So I really have to say, counsel -- that it's just too late in the game.

Following a week-long trial, the jury returned a verdict for the respondents, except with respect to an award of nominal damages in the amount of $1.00 to petitioner Daryl Stephen on his claim against respondent Brill. The jury declined to award punitive damages. The District Court entered judgment on June 15, 2009 (A1953).

Petitioners filed a Notice of Appeal on July 8, 2009 (A1954-A1955). They sought a new trial, claiming that the District Court erroneously failed to instruct the jury on the affirmative duty of law enforcement officers to intervene to prevent violations of constitutional rights by other law enforcement officers in their presence. Petitioners further claimed that the District Court compounded its error by incorrectly instructing the jury that it must consider petitioners' excessive force claims independently against each individual respondent.

The Court of Appeals for the Second Circuit affirmed, stating (Appendix A at 3a),

We see the issue not as whether a police officer has a duty to intervene, but whether the district court abused its discretion in declining to permit plaintiffs to introduce a new theory of liability at trial. Plaintiffs' fourth amended complaint did not give defendants notice that plaintiffs intended to pursue a 'duty to intervene'

theory of liability, and thus, plaintiffs' proposed jury instruction would have introduced a new claim to the case. In essence, plaintiffs were seeking leave to amend their complaint as trial was about to commence.

In the view of the Circuit Court, petitioners were, in essence, seeking leave to amend their complaint as trial was about to commence (Appendix A at 3a), and the decision by the trial judge to deny petitioners leave to introduce a new theory of liability at that late juncture did not amount to an abuse of discretion. See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87 (2nd Cir. 2007) (denial of leave to amend reviewed for abuse of discretion).

The Circuit Court went on to observe that, although petitioners maintained that a "duty to intervene" charge was essential to their ability to recover from respondents where it was "impossible" for them to identify their specific attackers, the (fourth amended) Complaint did not proceed on that theory (Appendix A at 3a-4a). To the contrary, the Complaint specifically ascribed particular allegations to individual officers (Appendix A at 4a):

Defendant Iliadis struck plaintiff Sean Stephen with a baton

Defendant Hayden struck plaintiff Sean Stephen in his jaw with a closed fist

Defendant Miller tightly handcuffed Sean Stephen . . . and deliberately pushed him into a wall.

Significantly, the Complaint did not allege any difficulty in determining each officer's role or give notice to respondents that petitioners would be proceeding under a 'duty to intervene' theory of liability (Appendix A at 4a).

Lastly, the Circuit Court of Appeals noted that the issue of including the proposed "duty to intervene" charge in the jury instructions was not brought to the District Court's attention until the final pre-trial conference, only days before the trial was set to begin (Appendix A at 4a). In the Court's view, it was well within the trial judge's discretion not to permit petitioners to introduce a new theory of liability at that point on the ground that respondents would be prejudiced by such a late amendment (Appendix A at 4a).

REASONS FOR DENYING THE WRIT

I. Petitioners' Fact-Based Claim Does Not Warrant This Court's Review.

The question raised by petitioners mischaracterizes the decision below and does not present any "compelling reasons" for granting the petition. See Sup. Ct. R. 10. Indeed, the District Court and the Second Circuit properly determined that respondents would have been unfairly prejudiced if petitioners were permitted to introduce a new theory of liability into the case, which they had previously abandoned in favor of a different theory prior to the commencement of discovery, on the eve of trial. Petitioners' challenge to the holdings of the Courts below, that respondents had notice of a legal theory that was not pled, is based on their particular interpretation

of the facts of this case. The decisions below explained why that interpretation does not undercut the District Court's proper exercise of discretion to refuse to allow the claim to be introduced, and the Courts' resolution of that issue does not warrant review by this Court.

Petitioners assert that "in this case, the Court of Appeals for the Second Circuit affirmed the District Court's holding that claims for the failure to prevent excessive force must be pleaded separately from claims for excessive force" (Petition at p. 6). Petitioners further assert that this holding, while consistent with the First and Sixth Circuits, is inconsistent with decisions by other circuit courts, including the Seventh and Eleventh Circuits, which do not require that claims against law enforcement officers pursuant to 42 U.S.C. 1983 for the failure to prevent the use of excessive force be pled separately from excessive force claims arising under the same statute.

However, petitioners mischaracterize the holding of the Second Circuit with respect to the duty to intervene. In fact, the Circuit Court affirmed the District Court's refusal to charge the jury on a "duty to intervene" theory as a proper exercise of its discretion. The Circuit Court, like the District Court, expressed concern that respondents had not been given notice that petitioners sought to proceed under that theory and, in fact, petitioners had not proceeded under that theory in the District Court. To the contrary, the Complaint ascribed specific usages of excessive force to individual officers. These allegations in the Complaint are inconsistent with the new theory that petitioners' sought to advance on the eve of trial – that

petitioners were unable to identify the specific officers who assaulted them and therefore had to rely upon law enforcement officers' "duty to intervene" in order to attach liability to the officers who were present in the apartment for the execution of the search warrant.

The District Court correctly refused to allow petitioners to include a claim, which had not been pled or tested in discovery, because respondents would have been unfairly prejudiced. Although an earlier version of the complaint alleged that two of the respondents observed the use of excessive force on plaintiffs, none of the superseding amendments to the complaint, including the final amendment prepared by counsel, contained this allegation (A89-A94, A104-A111). The District Court properly noted that the omission of the claim from subsequent pleadings likely lulled respondents into believing that petitioners had abandoned that theory of liability, and consequently, the omission would have caused respondents to not conduct discovery to defend against it.

Based upon the foregoing, this petition does not merit this Court's attention.

II. Petitioners Have Not Shown a Conflict in the Case Law or Identified an Important Federal Question to Support Their Petition for Certiorari.

Petitioners' petition fails to establish a conflict among the Circuit Courts of Appeals, or a conflict with this Court's prior cases, so as to justify their petition for certiorari.

It is well-settled that a complaint must give defendants "fair notice" of the claim and the ground upon which the claim rests. Fed. R. Civ. Proc., Rule 8; Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002); Conley v. Gibson, 355 U.S. 41, 47 (1957); Ashcroft v. Iqbal, 2009 U.S. LEXIS 3472, at *28-29, *44, No. 07-1015 (U.S. May 18, 2009) (dismissing a complaint for failure to state a claim as the Federal Rules of Civil Procedures "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" and where the complaint merely "tenders naked assertions devoid of further factual enhancement") (internal quotations and citations omitted).

Petitioners theorized that officers are necessarily liable for failure to intervene by their mere presence in a location where excessive force was allegedly used, even if the officers were unaware that excessive force had been used and thus had no opportunity to intervene (App. Br. at pp. 21, 29-30). However, as we argued in the Circuit Court of Appeals, this theory impermissibly relieved petitioners of the obligation to attach liability to a defendant based upon particularized allegations against him. More importantly, however, these claims were never pled.

In fact, the Complaint alleged only generalized claims for excessive force against the individually named officers. There was no allegation that any of the officers observed, or were even in a position to observe, any excessive force committed against petitioners.[4] Nor did petitioners

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[4] See Fanelli v Town of Harrison, 46 F Supp 2d 254, 258 (S D N Y 1999) (observing that, if the plaintiff had alleged

provide any context in terms of where in the apartment or at what point each purported act of excessive force occurred.

Petitioners argue that there is no requirement that a claim for failure to intervene be pled separately when excessive force has been alleged; however, they acknowledge that this Court has never held that claims for duty to intervene are subsumed by claims for excessive force. Here, the Complaint utterly failed to give respondents notice of a claim for failure to intervene, and petitioners never sought to amend their complaint to include this claim. In fact, the District Court correctly remarked that petitioners' amendment of the complaint, removing what arguably could be broadly construed as a failure to intervene claim, in fact, had the effect of putting respondents on notice that they were not going to be facing exposure for failure to intervene (A1667). Where respondents did not receive notice of the claim, there was no basis to charge the jury on that claim.

The mere fact that the respondent officers were present in the apartment is insufficient to establish that the officers were aware of any alleged instances of use of excessive force and failed to avail themselves of the opportunity to intervene. This is especially true given the fact that the

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facts tending to show that a responding officer had observed an altercation between an off-duty officer and plaintiff and was thus in a position to know that there was no basis for the off-duty officer to effectuate the arrest, then plaintiff might be able to make out a claim that the responding officer violated the duty of every police officer to intervene when he sees civil rights being violated)

respondents were present in connection with the execution of a search warrant, and were inside different rooms of the apartment at different times in furtherance of that purpose.

Petitioners were represented by counsel when they filed their (fourth amended) Complaint (A282). Because petitioners were not entitled to the liberal pleading standard which is afforded to unrepresented parties, there was no basis upon which to allow them to assert for the first time, on the eve of trial, a claim for failure to intervene. There were no allegations in the Complaint that would have put respondents on notice that a failure to intervene theory of liability would be pursued.

Furthermore, there is a vast weight of authority in other circuits establishing the impropriety of raising failure to intervene for the first time in opposition to a summary judgment motion. See Calvi v. Knox County, 470 F.3d 422 (1st Cir. 2006); Harper v. Albert, 400 F.3d 1052 (7th Cir. 2005); Thornton v. Spooner, 872 F.2d 1029 (6th Cir. 1989). Accordingly, where other appellate courts have denied the attempt to raise such a claim at the summary judgment stage, petitioners' attempt here to raise the claim on the eve of trial in a proposed jury instruction was even less compelling.

Finally, as the Courts below recognized to allow petitioners to proceed otherwise would have severely prejudiced respondents. Contrary to petitioners' claim, respondents were not on notice of this purported claim and no discovery was conducted on this issue. This was significant because a failure to intervene claim has its own

elements, separate and apart from a claim for excessive force.[5]

With the numerous respondents in this action, had petitioners pled a failure to intervene cause of action, discovery would have been necessary regarding the aforementioned elements. On the eve of trial, there was no opportunity to conduct further discovery, and respondents would have been severely and unfairly prejudiced by that lost opportunity. At the charging conference, the District Court properly refused to allow the claim to be included in the case because respondents were not put on notice of that theory of liability until after the close of discovery, and there was no explanation for petitioners' failure to seek leave to amend their complaint to plead this claim (A1661-A1662).

The jury instruction in this case was properly based upon the claims pled and tested in discovery -- excessive force against all respondents. Because respondents were not given notice that petitioners intended to pursue a theory of liability under a duty to intervene, there was no basis upon which to charge the jury to consider that claim. As a result, the District Court properly instructed the

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[5] In an excessive force claim, a jury need only consider whether the officers acted reasonably in light of the facts and circumstances of the situation they faced, without regard to their underlying motives or subjective intent toward the suspect. See Graham v. Connor, 490 U.S. 386, 397 (1989). Some of the factors to be considered are whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. See id.; Sullivan v. Gagnier, 225 F.3d 161, 165 (2nd Cir. 2000). These are not the elements of a failure to intervene claim.

jurors to consider "the element at issue as to each defendant by a preponderance of the evidence" (A1868).

Petitioners' theory on appeal, that claims for failure to intervene are encompassed by claims for excessive force and need not be separately pled, is without merit and was not warranted based on decisions from other federal appellate courts.

Miller v. Smith, 220 F.3d 491 (7th Cir. 2000), actually undercuts plaintiffs' argument. In Miller, plaintiff had sued all six officers that eventually arrived on the scene of an alleged assault. Id. at 493. All claims against the three officers who arrived at the scene too late to have been involved in the alleged use of excessive force were dismissed, and later, plaintiff withdrew claims against a fourth officer, leaving only two officers in the action. Id. Based on the summary judgment context and viewing the evidence in the light most favorable to the plaintiff, the court found that plaintiff had presented a viable claim where he alleged that, while he was lying face down on the ground, one of the two remaining defendant officers beat him while the other officer stood idly by. Id. at 491.

In this case, like Miller, some of the named respondent officers arrived on the scene after petitioners had already been secured. Neither petitioner distinguished them from the officers comprising the ESU team who were the first to enter the apartment and were responsible for securing the occupants of the apartment (A262-A263). Further, petitioners' challenge to a jury instruction does not entitle them to the same

favorable standard that a non-movant would be given in the summary judgment context, particularly when the challenge involves a claim that was not pled, tested in discovery, or supported by the evidence.

Petitioners' reliance on Richman v. Sheahan, 512 F.3d 876 (7th Cir. 2008), another Seventh Circuit case, is equally unpersuasive. In Richman, a grossly obese man became irate in a courtroom and clung to the podium, refusing to leave. Id. at 880. After the judge pressed a panic button, a swarm of deputies dragged the man away from the podium, and several of them sat on his back as he continued to struggle while laying face down on the floor. Id. The man was eventually handcuffed, after which the deputies saw that he was dead. Id. There, the appellate court reversed the grant of summary judgment, observing that "with regard to those deputies who just stood around looking while (the decedent) was being swarmed, [i]f they should have realized that their colleagues were using excessive force they had a duty to intervene, for they were part of the arresting force, awaiting a call to join the swarm should it become necessary." Id. at 885. Unlike Richman, the evidence adduced in this case did not support a claim that any of the officers should have realized that fellow officers were using excessive force against the petitioners. Indeed, in this case, petitioners made only generalized allegations of excessive force against officers whose names were included in the warrant paperwork.

Nor does Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995), relied upon by petitioners, compel a different result. In that case, the Fifth Circuit

affirmed the denial of motions for summary judgment against three officers under section 1983 where a genuine issue of material fact existed as to whether the officers were present at the scene and failed to take reasonable steps to protect a suspect from another officer's use of excessive force. The plaintiff in Hale alleged, inter alia, that Officer Fant stood by and laughed as Officer Fox slammed plaintiff against the car; rammed his fist into plaintiff's testicles, and repeatedly tried to slam plaintiff's head into the car; and that officers Stroud and Fant yelled encouragement at Officer Fox. Those facts are very different from the facts here, where petitioners alleged excessive force against officers based solely on their presence at the execution of a search warrant, without any specifics whatsoever about what a particular respondent did or did not do.

Finally, Campbell v. Lynch, 264 Fed. Appx. 836; 2008 U.S. App. LEXIS 2928 (11th Cir. 2008), is unavailing. In that case, after two officers responded to a report of domestic violence and neutralized the situation, they arrested the subject of the report and instructed the plaintiff caller to go inside her home. Because there was no justification for the officers to enter plaintiff's home and detain her, a reasonable juror could find that force was unnecessary where she had committed no crime and posed no danger to herself or others, and the other officer failed to take reasonable steps to protect her. This case is distinguishable because there was no challenge to the lawfulness of the officers' presence in the apartment, and there was no evidence to support any officers' awareness of a fellow officer's unlawful use of force against petitioners.

None of these cases are analogous to the facts presented in the case at bar. Accordingly, the Stephens' petition cannot be based on a conflict in the Circuits Courts of Appeal.

For all the reasons stated, the Second Circuit properly affirmed the District Court's refusal to permit petitioners' to introduce a new theory of liability on the eve of trial as a proper exercise of its discretion. This case does not raise any issues warranting further review by this Court.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
November 1, 2010

Respectfully submitted,

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